80-1591

No.

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CLERK

In the Supreme Court of the United States

October Term, 1980

JENNY MANSUKHANI,
Plaintiff and Appellee,
Petitioner,

VS.

DONALD AND JEAN PAILING,
Defendants and Appellants
SANDY PAILING, JANE DOE AND
RICHARD ROE,
Defendants,
Respondents.

RETURN TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Daniel J. Chapman, Counsel of Record
Chapman & Chapman Law Office
Box 1258, 410 East Thayer Avenue
Bismarck, North Dakota 58502
Attorneys for Donald and Jean Pailing

QUESTIONS PRESENTED FOR REVIEW

We would see the only question to be presented for review as being whether the North Dakota court's insistence upon a fair hearing on the question of the best interests of the children before removal of children from a familiar environment in which they have lived for almost four years, since their very tender years, and before removal of children from the only persons now alive that they regard as "parents" is a suspension of the writ of habeas corpus.

Questions of due process and equal protection are specious and are barely referred to or argued in the Petition and we submit that they are not seriously urged by the Petitioner and thus may be deemed to be abandoned.

II

PARTIES

The only real persons to this proceeding are the petitioner, Jenny Mansukhani, who is the mother of the children involved in this proceeding, and Donald and Jean Pailing, grandparents of the children, with whom the children have resided since December of 1976.

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No.

In the Supreme Court of the United States

October Term, 1980

JENNY MANSUKHANI,
Plaintiff and Appelle,
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vs.
DONALD AND JEAN PAILING,
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SANDY PAILING, JANE DOE AND
RICHARD ROE,
Defendants,
Respondents.

RETURN TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Respondents pray that the United States Supreme Court decline issuance of a Writ of Certiorari to the Supreme Court of North Dakota to review the decision in the case of Jenny Mansukhani, Plaintiff and Appellee v. Donald and Jean Pailing, Defendants and Appellants, Sandy Pailing, Jane Doe and Richard Roe, Defendants.

OFFICIAL REPORT OF OPINION DELIVERED BELOW

The decision and opinion of the North Dakota Supreme Court in *Mansukhani v. Pailing* is reported in 300 N.W.2d 847 (N.D. 1980).

JURISDICTION

Jurisdiction is not denied if, in fact, any provision of the United States Constitution has been violated. We submit that none has.

STATEMENT OF FACTS

This case involves the best interests of two children Jennifer Pailing and Allen Pailing, who have resided in the home of their grandparents, respondents in this proceeding, since December of 1976. When they came to live with their grandparents, Jennifer was two years and one month old and Allen was four months old. In October of the following year, 1977, a divorce decree was entered dissolving the marriage of James and Jenny Pailing, who were the parents of these children. By that decree, custody of the children was given to the father, James Pailing, who resided with his parents for most of the time, but the responsibility of the day-to-day care and nurture of the children was that of the grandparents.

James Pailing was killed on July 22, 1980. On August 4, 1980, a Petition for Writ of Habeas Corpus was filed by Jenny Mansukhani (she has remarried after the divorce decree) and on August 8, 1980, the hearing was held on the Petition, as a result of which the Burleigh County, North Dakota, Trial Court ordered that custody of the children be immediately awarded to Jenny Mansukhani who had last visited with the children on December 11, 1978. The Court did order that there be an adjustment period during which the children would gradually work into their new environment.

Upon appeal, it was ruled that the Trial Court was required to inquire into the best interests of the children at an evidentiary hearing, something that had been denied to the respondents in the initial proceedings before the Trial Court. It was the position

E R R A T A

of the Petitioner, concurred in by the Trial Court, that a natural mother is entitled to custody of children, irrespective of whatever may have occurred prior to the Petition for Writ of Habeas Corpus and that, unless the persons having physical custody of the children can show that the mother is unfit, the children may be taken from the home that they have known as theirs almost their entire life and thrust into unfamiliar surroundings with strangers, albeit one may be a natural parent.

No court has ever found nor has it even been suggested to any court that the children are not being properly taken care of by their grandparents, respondents herein, nor has any court, to date, inquired into the reasons why Jenny Pailing, who now so vigorously seeks custody of these children, virtually abandoned them in December of 1976 and had not seen them from December of 1978 to the death of their father in July of 1980. Nor has anyone, to date, looked into the environment into which the mother seeks to take these children.

It is to inquire into these and other matters that the Supreme Court of North Dakota ordered that the summary award of custody of these children to their mother taking them out of a situation in which virtually the only home that they have known is with their grandparents must be reversed and an evidentiary hearing held to determine the best interests of these children.

No suspension of the Writ of Habeas Corpus has occurred in the State of North Dakota.

ARGUMENT

Petition has postulated in this Petition for Writ for Certiorari and in other courts that the only reason that she does not have custody of her children is that "She is not physically able to snatch her children back nor rich enough to hire someone to do so on her behalf." (See page 9 of Petition)

This might suggest that the courts of North Dakota are not open to the due process of law and that matters of custody are settled by the size of the contestants or the ability of one or the other to procure the unlawful assistance of gangster-types to effect a violation of this state's law relating to kidnapping.

of the Petitioner, concurred in by the Trial Court, that a natural mother is entitled to custody of children, irrespective of whatever may have occurred prior to the Petition for Writ of Habeas Corpus and that, unless the persons having physical custody of the children can show that the mother is unfit, the children may be taken from the home that they have known as theirs almost their entire life and thrust into unfamiliar surroundings with strangers, albeit one may be a natural parent.

Quite the opposite is true. Respondents have urged from the outset of this case that an evidentiary hearing must be held to determine the best interests of the children, a concern which should be of importance to all concerned.

This is not an unusual holding; in fact, it appears to be almost an universally accepted mode of procedure. 39 Am.Jur.2d HAREAS CORPUS, Sec. 148.

Petitioner relies upon *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208, but that is a case which involves an entirely different question. That was an equal protection case which involved the right of an unwed father of illegitimate children to a hearing to determine his fitness for custody of his children just as other parents and the unwed mother are entitled to be heard.

In fact, *Stanley v. Illinois*, supra, is akin to what we have in this matter. Petitioner would urge that she should have the right to take her children out of familiar surroundings and from the only persons living whom the children regard as "parents". Respondents urge that the matter should be heard by a court of competent jurisdiction *before* the disruption of the lives of these children should be permitted, if at all.

Petitioner complains of the fact that there has been considerable delay and that her right, if there be such a right, cannot be exercised because of the refusal of the North Dakota Supreme

Court to bandy these children back and forth pending a final determination of this matter. That delay, however, is largely the fault of Petitioner. It is her insistence that there should be no hearing on this matter that has caused the delay. But for her the hearing would have been held last summer and this matter would likely have been concluded by this time.

Respondents have caused no delay except to exercise rights of appeal available to them under North Dakota law. They agreed to, even sought, an expedited hearing in this matter.

Throughout all of these proceedings, Petitioner has contended that the North Dakota court is incorrectly perceiving the law of Habeas Corpus as it applies to child custody cases. To the contrary, a number of states have taken the same position as that of the North Dakota court. In *Halstead v. Halstead*, 144 N.W.2d 861, the Iowa court reversed an award of a twelve-year-old boy to his mother where the child had lived with his grandparents for the past ten years, holding that the "best interests" test should be applied.

The same result was reached in *Howarth v. Northcott*, 152 Conn. 460, 208 A.2d 540, wherein it is held that the court may, in the exercise of its discretion, determine what is the best for the welfare of the child and that the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate.

A few decisions are to the contrary. See, for example, *Raymond v. Cotner*, 175 Neb. 158, 120 N.W.2d 892.

The point is, however that North Dakota is aligned with what appears to be the majority view and the question to be considered by the United States Supreme Court is simply whether or not the determination of the states, such as Connecticut,

Iowa, Virginia, and North Daktoa, offends any Federal law or Constitutional provision.

Petitioner argues, of course, that what the rule in North Dakota and other states does is to suspend the Writ of Habeas Corpus. This court has held, however, in *Swain v. Presley*, 430 U.S. 372 (1977), that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."

Thus, where, as in this instance, the North Dakota court has provided simply that the court should allow enough time to permit a fair evidentiary hearing before permitted the allowance of the writ, the requirements of the constitution have been met.

Not even in those states where the highest courts have held that the "best interests" test in cases of child custody must yield to the right of the parent to have custody do the courts hold that the writ should issue without a hearing to determine the fitness of the parent. In Nebraska, for example, in *Raymond v. Cotner*, supra, that court tried the matter as a de novo proceeding by review of an extensive record that had been made in the trial court. The court, in that case, did not rule, as in this case at bar, that no evidentiary hearing should be permitted because there had been no showing of unfitness, the hearing coming two days after the writ had issued.

In short, Petitioner has cited no case where, as she contends, it has been held that the custody of the child should be forthwith, sans hearing, be turned over to the parent. The only presented in the cases is which of the tests should be applied.

There is, then, no federal question involved and Certiorari should be denied.

Dated this 8th day of June, 1981.

Respectfully Presented,

DANIEL J. CHAPMAN, Counsel of Record
Chapman & Chapman Law Office
P.O. Box 1258, 410 East Thayer Ave.
Bismarck, North Dakota 58502
Attorneys for Donald and Jean Pailing

A1

APPENDIX

STATE OF NORTH DAKOTA
COUNTY OF McLEAN

IN DISTRICT COURT
FOURTH JUDICIAL DISTRICT

James A. Pailing, Plaintiff,	)	Civil No. 11097
vs.	)	
Jenny Pailing, Defendant.	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.**

The above entitled action, having come before the Honorable M. C. Fredricks, Judge of the District Court at the Courthouse in the City of Washburn, McLean County and State of North Dakota, on the 21st day of September, 1977, the Plaintiff appearing in person and by his attorney, Mervin A. Tuntland, and the Defendant not appearing in person or by counsel.

It appearing to the satisfaction of the Court that the Summons and Complaint were duly and personally served upon the Defendant and that the Defendant had in writing set in proper form, consented to a default judgment in the matter.

The Plaintiff having introduced evidence in support of the allegations of his Complaint and the Court having duly considered the evidence and the pleadings in said action and being fully advised in the premises, hereby makes the following:

FINDINGS OF FACT.

I.

That the Plaintiff is a citizen of the United States and is now and has been in good faith a resident of the State of North Dakota, for more than one year last past immediately preceding the commencement of this action.

II.

That the Plaintiff and Defendant were married at Minot, North Dakota, June 7, 1974.

III.

That two children were born to this union, viz: Jennifer Ann - born November 12, 1974 and Allan Anthony - born August 1, 1976.

IV.

That irreconcilable differences have arisen between the parties and it is impossible for the Plaintiff and Defendant to continue their relationship as husband and wife.

The Court having made this Findings of Fact, hereby makes its

CONCLUSIONS OF LAW.

1. That this is an equitable action, triable before the Court without a jury and the Court has jurisdiction of the parties and of the subject matter of this action.

2. That the Plaintiff is entitled to a judgment and decree of this Court dissolving the marriage relationship existing between the Plaintiff and the Defendant and awarding the Plaintiff an absolute decree of divorce.

3. That the Plaintiff be awarded the custody of the two minor children, viz: Jennifer Ann and Allan Anthony. That the Defendant shall have reasonable visitation, rights, including the right to have custody of said children overnight on weekends.

4. That each of the parties be awarded the ownership of all of the property which he or she had in possession at the institution of this action.

5. That the Plaintiff shall pay to the Defendant's attorney, Moody M. Farhart, the sum of Three Hundred Dollars ($300.00) as and for partial attorney fees and costs, and that the Plaintiff shall also pay his own attorneys fees.

6. That either party may remarry at any time after the entrance of this decree of divorce in this action.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 21st day of September, 1977.

BY THE COURT:

M. C. Fredricks, District Judge
Fourth Judicial District.

STATE OF NORTH DAKOTA
COUNTY OF McLEAN

IN DISTRICT COURT
FOURTH JUDICIAL DISTRICT

James A. Pailing	)	Civil No. 1107
Plaintiff	)	
	)	
vs	)	**JUDGMENT AND DECREE**
Jenny Pailing	)	
Defendant	)	

The above entitled action, having came before the Honorable M. C. Fredricks, Judge of the District Court at the Courthouse in the City of Washburn, McLean County and State of North Dakota on the 21st day of September, 1977, the Plaintiff appearing in person and by his attorney, Mervin A. Tuntland, and the Defendant not appearing in person or by Counsel.

It appearing to the satisfaction of the Court that the Summons and Complaint were duly and personally served upon the Defendant and that the Defendant had in writing set in proper form, consented to a default judgment in the matter.

The Plaintiff having introduced evidence in support of the allegations of his Complaint and the Court having duly considered the evidence and the pleadings in said action and being fully advised of the premises made its Findings of Fact, conclusions of Law and Order for Judgment:

NOW THEREFORE on motion of Mervin A. Tuntland, attorney for the Plaintiff:

IT IS ORDERED, ADJUDGED AND DECREED:

That the marriage relationship existing between the Plaintiff and the Defendant is dissolved on the grounds of irreconcilable

differences and the Plaintiff is hereby awarded an absolute divorce from the Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff is awarded the custody of the two minor children, viz Jennifer and Allan Anthony; that the Defendant shall have reasonable visitation rights, including the right to have custody of said children overnight and on weekends.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff shall pay the Defendant's attorney the sum of Three Hundred Dollars ($300.00 as and for partial attorney fees and costs, and that the Plaintiff shall pay his own attorneys fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties be awarded the ownership of all of the property which he or she had in his or her possession at the institution of this divorce action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that either party may remarry at any time after the entrance of this decree of divorce in this action.

Witness the Honorable M. C. Fredricks, Judge of the District Court in and for the County of McLean, State of North Dakota, and my hand and seal this 4th day of October, 1977.

R. M. Lundgerg, Clerk of the District Court, McLean County, North Dakota

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Jenny Mansukhani	)	Civil No.
	)	
Petitioner	)	
	)	
v	)	**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**
	)	
Donald Pailing, Jean Pailing, Sandy Pailing, Jane Doe and Richard Roe,	)	
	)	
	)	

COME NOW the Respondents Pailing, by and through their Attorney, and make the following as their Response to the Petition for Writ of Habeas Corpus and attached pleadings, served upon them by the Petitioner on August 5, 1980, and state that:

1. Your Respondent Donald Pailing is the grandfather to the children involved in this action; your Respondent Jean Pailing is the grandmother to the children involved in this action; your Respondent Sandy Pailing is the aunt to the children involved in this action. To the best information of these Respondents, there are no other parties who may be designated as Jane Doe and Richard Roe;

2. The children herein involved are Jenny Pailing (5 years of age) and Allen Anthony Pailing (4 years of age);

3. That by a divorce decree rendered in McLean County, North Dakota, in October of 1977, the custody of these children was placed in their natural Father, James A. Pailing;

4. That the natural Father, and custodial parent, resided with these Respondents, and they all resided together with the children, from the date the children were brought to the Respondents home up to this date.

5. That the Petitioner was represented in the divorce action by Moody M Farhart of Minot; that the natural father was represented by M Tuntland. These respondents are personally aware of the Petitioner's legal representation, due to the attorneys fees which their son paid to said counsel, on the Petitioner's behalf;

6. That the children were brought to these Respondent's home on December 12, 1976, and have resided in the home of these Respondents home since that date. These Respondents have formed an attachment to the children, and the children have formed an attachment to these Respondents. Your Respondents assisted in parenting the children, and assisted the natural Father and custodial parent with all phases of child care, including but not limited to the physical, emotional and financial care and assistance of the children. The home of the Respondents, and their family unit, is the only home and family these children have known since December 12, 1976;

7. The natural Father to these children was killed in a vehicle accident on July 22, 1980; his death has understandably been very hard on these Respondents and the children;

8. The natural Mother and Petitioner in this action, has never been denied visitation with the children, and has had visitation with them on each and every occasion she has requested it or has come to the home of these Respondents to see the children; however, these Respondents did not feel it in the best interests of the children for the Petitioner, who has not established nor carried through with a parental relationship with these children, to take them with her on August 1, 1980;

9. That the visitation schedule of the Petitioner and children is as follows:

1976
Dec 12 - children dropped off at Respondent's home in Butte, ND; Petitioner's mother had been caring for the children and asked these Respondents to babysit. The children were brought to Respondent's home, never picked up, and have resided with these Respondents since that date;

1977
Apr 8
Apr 23
May 6
June 11
-- Oct - divorce Judgment
Nov 5
Nov 12

1978
Feb 27
July 17
Nov 24
Dec 11

The visitation between the Petitioner and the children has always taken place in the home of the Respondents; she has never requested visitation over night. On Nov 5, 1977, she did take the children to her car, and the daughter cried so hard that the Father refused to let her go. Other than these periods of visitation (which were usually for short periods of time) the Petitioner has had no contact with the children: she does not call to speak with them nor inquire about them with these Respondents; she has not sent cards, presents, nor communications of any nature to them; she has not provided nor offered

to provide any financial assistance for them nor has she provided any clothing or other items for them. On the Feb 27, 1978 visitation she did bring Christmas gifts.

Your Respondents have recently moved to Bismarck and are temporarily residing in an apartment until they can find suitable housing. At the time of their move, they let persons in their former community know of the move, particularly persons who may have been acquainted with the Petitioner, and have every reason to believe and do believe that their move and new location and address was communicated to the Petitioner, although they, themselves, did not notify her. However, there have been periods of time when they did not know the whereabouts of the Petitioner, and only through 'gossip' learned of her remarriage.

These children are not acquainted with the Petitioner's new husband, and are not acquainted with the Petitioner's daughter by this marriage. To wrench these children from the only home and family they have known, since the boy was 4 months old and the girl 2 years old, and to place them with the Petitioner with whom they do not have a family relationship, in her home with which they are unfamiliar, in a different community and with a stepfather they have never seen, and a stepsister they have never seen, would be contrary to the best interests of these children regardless of whatever other circumstances might be involved. To do so only a short time after the death of their Father, is definately detrimental to these young children;

Your Respondents respectfully request, that arrangements be made to enable the children and the Petitioner to become acquainted, and to gradually work out visitation and contact between the Petitioner and children in a manner that would be in their best interests.

Your Respondents also respectfully request, that prior to custody being placed in the Petitioner, a legal determination be made as to whether or not such custodial arrangement would

be in the best interests of the children. These Respondents offer to the Court, that they have legal standing to intervene and to request custody of the children in themselves; they have acted as psychological parents to these children since December 12, 1976. That their home should be considered by the court, as a home which would offer the children continued stability and that a home study and investigation be had, so as to properly inform the court of all alternatives open to these children.

Dated at Bismarck, North Dakota, this 8th day of August, 1980.

CHRISTENSEN & THOMPSON

By_____
Carma Christensen
Attorneys for the Respondents Pailing
Box 1771
Bismarck, North Dakota 58502

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Jenny Mansukhani, Plaintiff	)	Civil No. 29959
-vs-	)	**PETITION FOR RECONSIDERATION AND STAY OF EXECUTION OF JUDGEMENT**
Donald and Jean Pailing, Sandy Pailing, Jane Doe and Richard Roe, Defendants	)	

STATE OF NORTH DAKOTA)
: ss
COUNTY OF BURLEIGH)

DANIEL J. CHAPMAN, being first duly sworn, deposes and says that at the request of Donald Pailing and Jean Pailing, he has reviewed the within and above matter; that he was first contacted on Friday, September 5, 1980, at which time he was requested by the said Donald Pailing and Jean Pailing to assume representation for them in this matter; that this affiant has reviewed this matter and verily believes that the Court may have overlooked important law in connection with this case; that the case of *McKay v. Mitzel*, 137 N.W.2d 792 (N.D. 1965) is squarely in point; that in such case the District Court, on habeas corpus, awarded custody of the child to the maternal grandparents, notwithstanding a find by the Court that the father was a fit person to have custody of the child; that *McKay v. Mitzel*, supra, holds that the best interest of the child is superior to the statute

giving preference to the natural parent; that this position is affirmed in *Odegard v. Odegard*, 259 N.W.2d 484 (N.D. 1977), in which an award of custody to the father and the grandparents was upheld by our Supreme Court; also in the case of *In the Interest of D.G.*, 246 N.W.2d 892 (N.D. 1976) our Supreme Court reversed an award of the District Court of custody to a father who returned after a long absence and restored custody of the child to the maternal grandparents; that the Order of the Court in this case simply finds the parties to be fit and proper persons to have custody of the minor children in this case and concludes that custody should be given to the mother on the basis of priority; that this affiant has visited with the children and found them to be happy children and even at this young age being able to state a preference for living in Bismarck with their grandparents; that this affiant has been advised of considerable evidence relative to the Plaintiff, Jenny Mansukhani, which would have a bearing upon the issue of the best interests of these children; that the children have lived with these grandparents since December of 1976 and no harm would come from permitting these children to remain with their grandparents pending a review of this matter; that a proceeding of this kind and of this importance to the children should be held only after an adequate time for the parties to prepare for the issues to be considered by the Court in a proceeding of this matter; that this is unlike a proceeding where the person is incarcerated when a speedy disposition of the habeas corpus matter is mandated; that in view of what this petitioner believes to be a misconception of the law, we respectfully request that this matter be reset for a hearing giving adequate opportunity to the parties to accumulate and present evidence and that this petition be considered a request for a new trial; that further the affiant requests of the Court that the final transfer of the custody to the Plaintiff in this matter be stayed pending the rehearing requested in this matter or until the Court can make a determination as to the advisability of holding the rehearing and this affiant further requests the Court in the event his request is denied that the Court consider a stay of execution on appeal so that in any event the final transfer

of the custody of these children be stayed until futher proceedings.

Daniel J. Chapman

Subscribed and sworn to before me this 10th day of September, 1980.

M. Phyllane Dohn, Notary Public
Burleigh County, North Dakota
My commission expires: 8/20/86

(SEAL)

ORDER STAYING EXECUTION OF JUDGEMENT

The Court having been presented with a Petition for Reconsideration and Stay of Execution of Judgment and the Court having considered the same and having determined that it would be in the best interests of the children involved in this proceeding, it does now hereby stay the final execution of the Judgment entered on the 22nd day of August, 1980, and specifically the Court stays the final transfer of possession and custody of the children to Jenny Mansukhani, which would ordinarily have taken place on the 12th day of September, 1980, and this stay will continue until the further order of this Court.

Dated this _____ day of September, 1980.

BY THE COURT:

Judge of the District Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appelle

-vs-

Donald and Jean Pailing,
Sandy Pailing, Jane Doe, and
Richard Roe,

Defendants-Appellants

AFFIDAVIT OF JEAN PAILING

STATE OF NORTH DAKOTA)
: ss
COUNTY OF BURLEIGH)

JEAN PAILING, being first duly sworn, deposes and says that she is the grandmother of the children with which this proceeding is concerned; that these children have been living with this affiant and her husband and her son, James, until his death on July 22, 1980, since December 12, 1976; that the only home that these children have known since that time has been that of this affiant and her husband and her son; that the children had not visited with their mother since December 11, 1978, prior to the death of their father who was this affiant's son; that these children are happy children in their present home and are well cared for and this affiant and her husband have been the psychoolgical parents of these children since December of 1976; that while this affiant's son was living he was working out of town and the primary responsibility for the care of these children was with this affiant; that for the past three weeks the children have visited with their mother as required by the Court's Order but they have stated a preference for being in Bismarck and it appears to this affiant that these visits have been upsetting to the

children; that there have been incidents of bed wetting and the children have talked of having no food while they were with their mother; that this affiant does not believe that they did not have food but she does believe that the experience has been upsetting to the children; that this affiant verily believes that a transfer of custody of these children to the mother would be a traumatic and devastating experience for these children, particularly in view of the very recent death of their father; that this affiant is concerned about the best interest of the children and information has been given to this affiant to the effect that the children would not have a good home with the Petitioner; that from the time this affiant and her husband were served with papers in this proceeding it was only 3 days until a hearing was held and this affiant and her husband had no opportunity to seek and obtain evidence with regard to the character of the home into which it was sought to place these children; that there were no home studies of the home of the mother, no person testified other than the mother as to the conditions of the home and her concern for her children; that there was no opportunity to present any evidence relating to the home or living conditions of the mother because of the shortness of the time between the service of the Writ and the holding of the hearing; that it is the understanding of this affiant that the Court ruling in favor of the mother in this case was based upon priority of custody to the natural mother and this affiant and her husband were not aware of their right to show that it would be in the best interest of the children to remain with them, at least for the present; that this affiant and her husband reside in the City of Bismarck and her husband is employed at the VFW Club; that if custody is retained in this affiant and her husband the status quo will simply be maintained whereas if custody is given to the mother it is very likely that severe and lasting adverse results will occur to the children.

_____

Jean Pailing

Subscribed and sworn to before me this 12th day of September, 1980.

Daniel J. Chapman, Notary Public
Burleigh County, North Dakota
My commission expires: 1/18/84

(SEAL)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appellee

-vs-

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,

Defendants-Appellants

PETITION FOR STAY OF EXECUTION PENDING APPEAL

Come now the Appellants in the above matter who petition the Supreme Court for a Stay of Execution pursuant to the provisions of Rule 8a of the Rules of Appellate Procedure for the reasons set forth as follows:

I.

That this proceeding was commenced with a Petition for Writ of Habeas Corpus, dated the 4th day of August, 1980.

II.

That the appellants were served with a copy of the Writ on the 5th day of August, 1980, and a hearing was held at 9:30 A.M. on the 8th day of August, 1980.

III.

That the hearing on said Petition lasted less than 1½ hours, as a result of which the Honorable Gerald G. Glaser, Judge of the District Court, South Central Judicial District, issued an Order granting the Writ according to an Order, a copy of which is attached hereto and made a part hereof.

IV.

That the Petitioner in this case is the mother of Allen Anthony Pailing and Jennifer Ann Pailing and said Petitioner was divorced from James Pailing, the son of these appellants.

V.

That in the divorce proceeding custody of these minor children was given to James Pailing and the children have resided with these appellants and their son, James, since December 12, 1976, and it is the only home that they have known since that time.

VI.

That prior to the commencement of these proceedings, the Petitioner had not exercised her right of visitation even though she lived within the State of North Dakota and within 120 miles of the home of the children and she had not seen the children since December 11, 1978.

VII.

That these children do not know the Petitioner as their mother and they are happy and well adjusted in their present home.

VIII.

That on July 22, 1980, James Pailing was killed in an automobile accident, whereupon these proceedings were commenced.

IX.

That the ruling of the District Court as set forth in its Order attached hereto is that the Plaintiff is a fit and proper person for the care and custody of the minor children of the parties and that these appellants, grandparents of said children, are also fit

and proper persons for the care and custody of the children, but that the mother, having a priority over said children should be awarded custody.

X.

That such a ruling is contrary to the case of *McKay v. Mitzel*, 137 N.W.2d 792 (N.D. 1965) in which a District Court awarded custody of a child to her maternal grandparents in a habeas corpus proceeding after the death of the mother to whom custody had been given.

XI.

That this Court squarely held that the best interest of the child is superior to the statute giving preference to the natural parent and this holding was examined in *Odegard v. Odegard*, 259 N.W.2d 484 (N.D. 1977) in which an award of custody of the father and the grandparents was upheld by the Court.

XII.

That in the case of *In the Interest of D.G.*, 246 N.W.2d 892 (N.D. 1976) this Court reversed an award of the District Court of custody to a father who had returned after a long absence and this Court restored custody of said child to the maternal grandparents.

XIII.

That the Order of the District Court in this case fails to take up the question of the best interest of the children and simply relies upon the statutory preference.

XIV.

That the appellants filed with the District Court a Petition for Reconsideration and Stay of Execution of Judgment and this has been denied.

XV.

That the provisions of the Order of Judge Glaser in this matter require permanent transfer of custody to the mother on the 15th day of September, 1980, unless the Order of the District Court is stayed.

XVI.

That an Appeal and Undertaking for Appeal has been duly filed in this case with the Clerk of the District Court for the South Central Judicial District and the filing fee has been paid.

XVII.

That all pertinent papers in this file are attached hereto and made a part hereof.

XVIII.

That the transfer of permanent custody of these children to their mother at this time would be an unnecessary traumatic occurrence in their lives, recently marred by the death of their father.

XIX.

That the children cannot be transferred to the care of the mother at this time without permanent and damaging effect upon the children.

XX.

That appellants assert that there is a reasonable chance that they will prevail on appeal.

XXI.

That it is in the best interest of these children that the status quo be maintained until the matter may be determined by this Court.

WHEREFORE, appellants pray that this Court issue an immediate temporary stay of the Order of the District Court requiring delivery of the custody of these children to the mother on the 15th day of September, 1980, and that a hearing be held on a stay pending this appeal pursuant to the provisions of Rule 8a of the Rules of Appellate Procedure.

Dated this 12th day of September, 1980.

CHAPMAN & CHAPMAN
Attorneys for Appellants
Donald Pailing and Jean Pailing
410 East Thayer - P.O. Box 1258
Bismarck, North Dakota 58502

by _____
Daniel Chapman

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appelle

-vs-

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,

Defendants-Appellants

AFFIDAVIT IN SUPPORT OF RETURN TO MOTION TO VACATE STAY OF EXECUTION PENDING APPEAL

STATE OF NORTH DAKOTA)
: ss
COUNTY OF BURLEIGH)

DONALD PAILING and JEAN PAILING, being duly sworn, depose and say that they are the grandparents of Jennifer Pailing and Allen Pailing; that this affidavit is made in response to the affidavit and return of Jenny Mansukhani in support of her recent Motion filed with the Supreme Court; that these affiants dispute most major points made by Jenny Mansukhani in her affidavit; that they absolutely dispute the idea that the children are not being properly taken care of; that they point out that they are taking care of the children in the same manner as they have always taken care of these children and the only difference is that their son, James, is no longer living; that the children are not subjected to vulgar or improper language; that they are not subjected to "a great deal of drinking activity"; that they have in no way spoken badly to the children of their mother or attempted to influence the children with regard to the possible move to their mother's home; that, to the contrary, the children are terrified of such prospect and these affiants have made every effort to ease their concern with regard to this

problem; that these affiants have a stable home and a loving and caring relationship with the children and it is the same relationship that they have had with these children since December 12, 1976; that these affiants have had one move from Butte, North Dakota, to Bismarck, and they do not have a shifting life style; that it would be in the best interests of these children to remain with affiants until this matter is finally concluded; that Jenny Mansukhani's affidavit is untrue when it states that the father of the children left the children for several months but in fact it was the appellee who left the children to go to live with her parents in Drake on March 17, 1976; that it is not true that appellee was destitute and shown by her own application for employment, a copy of which is attached hereto and made a part hereof; that she worked from January of 1976 to December of 1976 as a bartender and cocktail waitress at Goodrich, North Dakota; that while Jennifer was in the custody of Jenny Mansukhani these affiants took pictures of the sore and improperly tended buttocks and private parts of Jennifer and these are attached hereto and made a part hereof; that Jennifer is now almost 6 years old and these pictures were taken when she was a baby; that, moreover, pictures further were taken of the condition of the trailer when she walked out of it and these are attached hereto and made a part hereof; that these appellants at no time have attempted to make themselves the psychological parents of these children and that they have not poisoned the childrens' minds against their mother; that the mother has not exercised her rights of visitation until the death of James Pailing, the son of these affiants; that they do not know what appellee is talking about as to a changing cast of characters and there is no truth to this whatsoever; that the children do not use bad language and their conduct is exemplary; that these affiants acted at all times at the direction of their attorney who advised them not to discuss the matter of the procedures being taken by their attorney with Jenny Mansukhani; that these affiants were not working to deflect the mother's attention or to lead them down the primrose path; that they did inform the mother as soon as information was given to them of

the existence of the stay order; that they have not shifted the children from building to building or adult to adult but at all times the children have lived with these affiants; that these affiants have moved one time from Butte, North Dakota to Bismarck; that these affiants know of no instances when the mother has been prohobited from taking the children for visitations; that the children are not willing, happy or eager to visit their mother but have cried and become anxious and nervous at the prospect; that they have not used the children contrary to their best interests to fill a void left by the death of their son; that these affiants pledge themselves to a speedy disposition in this matter and that they will do nothing in the interim to deprive these children of the opportunity to see and visit their mother; that they have the best interests of these children at heart and feel that any abrupt change of custody for these children will be traumatic and difficult for the children; that if the Court ultimately orders that the transfer be made that they will do everything that they can to make the transfer easy on the children.

Donald Pailing

Jean Pailing

Subscribed and sworn to before me this 25th day of September, 1980.

Daniel J. Chapman, Notary Public
Burleigh County, North Dakota
My commission expires: 1/18/84

(SEAL)

"WE ARE AN EQUAL OPPORTUNITY EMPLOYMENT COMPANY. WE ARE DEDICATED TO A POLICY OF NON-DISCRIMINATION IN EMPLOYMENT ON ANY BASIS INCLUDING RACE, CREED, COLOR, AGE, SEX, RELIGION OR NATIONAL ORIGIN; OR PHYSICAL DEFECTS"

APPLICATION FOR EMPLOYMENT

PERSONAL INFORMATION

DATE Jan 11 10

NAME Mercredith Jenny D.
(LAST) (FIRST) (MIDDLE)

PRESENT ADDRESS

PERMANENT ADDRESS 108 2nd Ave NW Surrey ND 58788
(STREET) (CITY) (STATE) (ZIP)

PHONE NO. 833-1761 SOCIAL SECURITY NUMBER 502-W-1886

REFERRED BY Minot Lady

EMPLOYMENT DESIRED

POSITION Bartender DATE YOU CAN START NOW SALARY DESIRED ?

ARE YOU EMPLOYED NOW? No IF SO MAY WE INQUIRE OF YOUR PRESENT EMPLOYER —

EVER APPLIED TO THIS COMPANY BEFORE? Yes WHERE — WHEN —

EDUCATION	NAME AND LOCATION OF SCHOOL	YEARS ATTENDED	DATE GRADUATED	SUBJECTS STUDIED
GRAMMAR SCHOOL	Drake	1-8	1910	General
HIGH SCHOOL	Drake	9-12	1914	Academic
COLLEGE				
TRADE, BUSINESS OR CORRESPONDENCE SCHOOL				

SUBJECTS OF SPECIAL STUDY OR RESEARCH WORK —

U.S. MILITARY OR NAVAL SERVICE — RANK — PRESENT MEMBERSHIP IN NATIONAL GUARD OR RESERVES —

ACTIVITIES OTHER THAN RELIGIOUS (CIVIC, ATHLETIC, FRATERNAL, ETC.) —

* EXCLUDE ORGANIZATIONS THE NAME OR CHARACTER OF WHICH INDICATES THE RACE, CREED, COLOR OR NATIONAL ORIGIN OF ITS MEMBERS.

(CONTINUED ON OTHER SIDE)

FORMER EMPLOYERS (LIST BELOW LAST FOUR EMPLOYERS, STARTING WITH LAST ONE FIRST).

DATE MONTH AND YEAR	NAME AND ADDRESS OF EMPLOYER	SALARY	POSITION	REASON FOR LEAVING
FROM May 81	Mexx		Barlady	was going
TO Aug-Sept 88	Jane's Hotel	25-30	Barlady-Cocktail	to have a baby
FROM April 87			Barlady-	only part time
TO Aug 87	Eddie Mac's Mexx	230	Cocktail	years to school
FROM Jan 86			Barlady-	
TO Dec 86	Walter Mackie	225	Cocktail	Was 21
FROM	Cockrell			
TO				

REFERENCES: GIVE BELOW THE NAMES OF TWO PERSONS NOT RELATED TO YOU, WHOM YOU HAVE KNOWN AT LEAST ONE YEAR.

	NAME	ADDRESS	BUSINESS	YEARS ACQUAINTED
1	Walter Mackie	Cockrell	Lawyer	6 yrs
2	Lee Rose	Mexx	Bartender	3 yrs

PHYSICAL RECORD:
LIST ANY PHYSICAL DEFECTS

WERE YOU EVER INJURED? No GIVE DETAILS —

HAVE YOU ANY DEFECTS IN HEARING? — IN VISION? — IN SPEECH? —

IN CASE OF EMERGENCY NOTIFY Mrs. James Field Surrey [illegible]
NAME ADDRESS PHONE NO.

I AUTHORIZE INVESTIGATION OF ALL STATEMENTS CONTAINED IN THIS APPLICATION. I UNDERSTAND THAT MISREPRESENTATION OR OMISSION OF FACTS CALLED FOR IS CAUSE FOR DISMISSAL. FURTHER, I UNDERSTAND AND AGREE THAT MY EMPLOYMENT IS FOR NO DEFINITE PERIOD AND MAY, REGARDLESS OF THE DATE OF PAYMENT OF MY WAGES AND SALARY, BE TERMINATED AT ANY TIME WITHOUT ANY PREVIOUS NOTICE.

DATE Jan 11 '88 SIGNATURE Jenny Alexander-Lowe

DO NOT WRITE BELOW THIS LINE

TO BE COMPLETED DAY EMPLOYMENT BEGINS DATE Jan 11 '88

HEIGHT 5'5" WEIGHT 135 AGE 23 DATE OF BIRTH 4-7-56

SINGLE MARRIED X WIDOWED CITIZEN U.S.A. yes SEX F

THE ABOVE INFORMATION NEEDED FOR PENSION, HOSPITALIZATION INSURANCE, ETC., AND NOT FOR HIRING PURPOSES.

INTERVIEWED BY		DATE	REMARKS	
NEATNESS			CHARACTER	
PERSONALITY			ABILITY	

HIRED FOR DEPT. POSITION WILL REPORT SALARY WAGES

APPROVED: 1. 2. 3.
EMPLOYMENT MANAGER DEPT. HEAD GENERAL MANAGER

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appellee

-vs-

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,

Defendants-Appellants

AFFIDAVIT IN SUPPORT OF RETURN TO MOTION TO VACATE STAY OF EXECUTION PENDING APPEAL

STATE OF NORTH DAKOTA)
: ss
COUNTY OF BURLEIGH)

DANIEL J. CHAPMAN, being first duly sworn, deposes and says that he is the attorney for the Defendants-Appellants in the above matter and he makes this Affidavit in support of a Return to Motion to Vacate Stay of Execution Pending Appeal; that this affiant did not handle this case originally and his first contact with the appellants was on the 5th day of September, 1980; that he then researched this matter over the weekend and attempted to set up a hearing with the Honorable Gerald G. Glaser, Judge of the District Court, South Central Judicial District, who sat on this case and ruled upon it; that this affiant was in this Court in another case on the 8th day of September, 1980 and had a hearing in Federal Court during most of the afternoon of that day; that on the 9th day of September, 1980, this affiant went to the Courthouse to attempt to set up the hearing before Judge Glaser and found that Judge Glaser was out of town and would not be back in town at the earliest until Wednesday, the 10th of September; that this affiant then attempted to contact the Honorable M.C. Fredricks, who was

the judge who sat on the divorce involving James Pailing and Jenny Mansukhani and this affiant reached Judge Fredricks to request that he assume jurisdiction but he declined to do so for the reason that he is no longer in the South Central Judicial District; that this affiant then presented the problem to the Honorable Benny Graff, Chief Judge of the South Central Judicial District, and this affiant explained the urgency of getting some judge to consider this matter before Friday as that was the date when the children were to be finally transferred to Jenny Mansukhani; that Judge Graff and this affiant agreed that a petition would be filed and handed to Judge Graff and he would discuss the matter with Judge Glaser if Judge Glaser happened to stop by the Courthouse during his vacation; that Judge Graff agreed that if Judge Glaser could not be reached he would sign a temporary stay order; that this procedure was followed and it was impossible to set up a hearing because of the fact that Judge Glaser was on vacation and we were merely seeking a temporary stay so that this matter could be reconsidered by Judge Glaser; that this affiant was in Sioux Falls taking a deposition on Thursday, the 11th of September; that on Friday, the 12th of September, 1980, this affiant attempted to reach Judge Glaser at the Trial Advocacy Seminar at the Holiday Inn and was unable to find him; that this affiant was advised at the Seminar by Judge Graff that Judge Glaser had returned to town and had received the petition filed by this affiant; that this affiant then determined that Judge Glaser was at the Burleigh County Courthouse and this affiant went to see Judge Glaser and found that he had already ruled against the stay; that the only alternative was to seek a stay in the North Dakota Supreme Court and appeal papers were filed and the temporary stay sought; that this affiant at no time acted in a "clandestine" manner and the Court will note that our application for the stay in this matter simply requested a temporary stay and a hearing on our request for the stay; that no attempt was made to deprive the Plaintiff-Appellee, Jenny Mansukhani, of any of her rights to notice prior to any action by the Courts but the restraints of time required that action be taken in this unusual fashion or irreparable

harm would occur to these children; that this affiant has visited with these children and finds them to be outstanding children who obviously have a good relationship with their grandparents and aunt; that there is not the slightest doubt in the mind of this affiant from the things that this affiant has thus far learned that it would be the best interests of these children to remain with their grandparents pending the disposition of this appeal; that this affiant would have no objection to an expedited appeal and that transcript was promptly ordered and may even at this time be completed as our last contact with the reporter indicated that it was almost done; that for appellants' part there is no reason why this matter cannot be argued in November and would abide by any time table which the Court may set up to facilitate this expedition of the appeal; that this affiant suggested to the appellants that they not indicate to the mother of the children what this affiant was attempting to do so that no breach in the arrangements would occur if the efforts were unsuccessful.

Daniel J. Chapman

Subscribed and sworn to before me this 25th day of September, 1980.

M. Phyllane Dohn, Notary Public
Burleigh County, North Dakota
(SEAL) My commission expires: 8/20/86

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appelle

-vs-

Donald and Jean Pailing,
Sandy Pailing, Jane Doe and
Richard Roe,

Defendants-Appellants

AFFIDAVIT OF MARJORIE CRISSEY

STATE OF NORTH DAKOTA)
: ss
COUNTY OF McLEAN)

MARJORIE CRISSEY, being first duly sworn, deposes and says that she is the manager of the Butte Exchange of the Bank of Turtle Lake; that she has lived in the town of Butte for a number of years and is well acquainted with Donald Pailing, Jean Pailing, Sandy Pailing, and the children of the late James Pailing and Jenny Mansukhani; that she has seen the Pailing children in the presence of their grandparents and she has observed that there is a loving relationship between these children and their grandparents, Mr. and Mrs. Donald Pailing; that these children are weil cared for, are clean, well clothed and well fed; that to the contrary when these children were in the custody of their mother they were not well cared for and this affiant saw the oldest child, Jennifer, at the time that Jenny Mansukhani had custody of said children and this affiant observed that the child had the worst rash on her buttocks and private parts that this affiant has ever seen; that this affiant's daughter was baby sitting said child at the time; that this affiant knows Sandy Pailing, as well as Donald Pailing and Jean Pailing and she

knows Sandy Pailing to be a responsible person and one who loves and cares for these children; that this affiant does not believe that any of the persons mentioned herein would do anything detrimental to the welfare of these children and in fact this affiant feels that the welfare of these children would be best served by placing these children in the care and custody of Mr. and Mrs. Donald Pailing.

_____

Marjorie Crissey

Subscribed and sworn to before me this _____ day of September, 1980.

_____

Notary Public, McLean County
State of North Dakota
My commission expires:

(SEAL)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appelle

-vs-

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,

Defendants-Appellants

RETURN TO MOTION TO VACATE STAY OF EXECUTION PENDING APPEAL

Come now the appellants in the above matter who, for Return to the Motion of the appelle, show to the Court, as follows:

I.

That the appellants in this matter, through their attorney, acted at all times with propriety and within the scope and intent of the Rules of Civil Procedure and the Rules of Appellate Procedure.

II.

That the appelle complains of notice in this proceeding but the notice in the instant proceeding by which custody of these children was sought to be taken was given to appellants on the 5th day of August in the afternoon thereof and the hearing was held at 9:30 A.M. on the 8th day of August, 1980.

III.

That, neverthless, the appellants, acting through their attorney, attempted to get the request for stay filed and a temporary

restraining order issued buy the Supreme Court granted the stay without notice of hearing.

IV.

That the appellants, nor their attorney, has ever acted "clandestinely" and they have not impeded justice but have simply sought justice.

V.

That the appellants, in not informing the appelle of actions to be taken by their attorney, were merley acting according to advice from their attorney.

VI.

That no prejudice occurred to the appelle by not being informed of procedures to be taken by the attorney of these appellants.

VII.

That the appellants did not use the period between the Court's order and the appeal to attempt to make themselves the psychological parents and they have not poisoned the children's mind against their mother or done anything improper with regard to this matter but have, to the contrary, attempted to prepare the children for the possible change of custody.

VIII.

That it is a matter of opinion as to who has been the psychoogical parents of the children but these appellants have cared for these children for all of the past 3½ years and during this period of time, their son, the father of the children, has also

been with the children but he is gone and these appellants are the only psychological parents which these children have left.

IX.

That it is necessary that these issues be determined in a proper proceeding, given after reasonable notice, and affidavits and counter-affidavits will not permit a fair and intelligent determination of these facts.

X.

That, in the meantime, permitting the children to be with the only custodians that they have known in recent years is not only sensible but clearly in the best interests of these children.

XI.

That the mother had *not* exercised her visitation rights in recent months until after the death of James Pailing.

XII.

That there has been no changing cast of characters with these appellants and their apartment is not occupied by a "known cast of characters".

XIII.

That the language of the children is not abominable and the affadivit as to the action of these appelants is not only false but it shows no foundation in fact or the manner in which any such information might have been obtained.

XIV.

That these appellants deny that any of the quoted authority applies in this case in view of the fact that custody of these

children was awarded to the father and they have lived with the father and these appellants until the death of the father and this stay merely seeks to maintain the status quo, into which these children were placed almost four years ago.

XV.

That is stay order will in no way have a permanent effect upon the ultimate result in this case.

XVI.

That these appellants would have no objection to an expedited disposition of this appeal and will cooperate in any such effort.

WHEREFORE, these appellants resist the motion of the appellee and ask that it be denied.

Dated this 25th day of September, 1980.

CHAPMAN & CHAPMAN
410 East Thayer - P.O. Box 1258
Bismarck, North Dakota 58502

By_____
Daniel J. Chapman